STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 21, 2013
v	No. 300533 Wayne Circuit Court
ANTHONY DIQUET PHILLIPS, Defendant-Appellant.	LC No. 10-002233-FC

Before: BORRELLO, P.J., and K. F. KELLY and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for first-degree felony murder, MCL 750.316(1)(b).[1] He was sentenced to life imprisonment without the possibility of parole. For the reasons set forth in this opinion, we affirm.

I. FACTS

This case arises from the 1987 murder of Lacey Tarver in Detroit. Tarver's body was discovered in his home on Piedmont (Piedmont house) on March 4, 1987. Several items were missing, including a computer, a small television, a VCR, a cassette player, Tarver's wallet, the keys to Tarver's car, and a stereo system. A basement window in the rear of the house was broken and appeared to be the intruder's point of entry. There was blood on the wall beneath the window and on some of the broken pieces of glass, indicating that the intruder cut himself while entering.

The prosecution introduced evidence regarding the facts and circumstances surrounding the murder. Tarver and Carmen Allen, f/k/a Carmen Phillips, dated and were engaged for about four years. They lived together in the Piedmont house. Allen's daughter from a previous relationship also lived in the home. Tarver and Allen ended their relationship around Thanksgiving of 1986 and she subsequently moved out.

[1] The underlying felony was breaking and entering of a dwelling. Defendant was not charged with that offense.

Defendant is Allen's brother. Allen also has a brother named Robert, or "Bobby." Allen testified that defendant, her mother, and her sister came over to the Piedmont house frequently when she and Tarver lived there together. Bobby visited less often. About a year before Allen and defendant broke up, someone broke into the Piedmont house. After the break-in, Allen's brother Bobby was not welcome at the house.

Allen testified that she did not know of any problems between Tarver and defendant; defendant was welcome in her home. Defendant and her father did all the plumbing, painting, and other work around the house. When Allen returned to Tarver's house about two weeks after their break-up to retrieve some of her belongings, defendant went with her to help. Allen testified that the week Tarver was murdered, she sent defendant to Tarver's house to retrieve a stove hood that Tarver did not want.

Erica Ridley, Tarver's daughter, was 11 years old when her father was killed. She recalled that her father was supposed to attend a birthday party for her great-aunt on Saturday, February 28, 1987, but he never arrived at the party. The family called Tarver's house all day but was unable to contact him. Debbie Moorer, Tarver's girlfriend at the time, was the last person to see Tarver alive; she was at his house on Thursday, February 26, 1987. After Moorer had not heard from Tarver for a few days, she left a note with Tarver's brother, Edgar Tarver. Edgar found the note in his mailbox in the early morning hours of March 4, 1987, and he went to Tarver's house to check on him. When Edgar arrived, he noticed that Tarver's car was in the driveway and there were lights on inside the house.

Edgar walked around the back of the house and saw that a basement window was broken. The back door was locked, but the front door was not. Inside, the house was in disarray and appeared as if someone ransacked the home. The lights in the hallway and kitchen were on. Edgar called for Tarver but got no response. He went further into the house and saw Tarver's feet sticking out of the northeast bedroom. Edgar then saw Tarver leaning against the wall with lots of blood all around him. Tarver appeared to be dead. He was still wearing a jacket. Edgar called his wife, who called the police. Edgar also noticed that some things were missing from the house, including some electronics and Tarver's wallet and car keys.

On March 4, 1987, Dr. Marilee Frasier conducted an autopsy on Tarver. Dr. Frasier died before the 2010 trial, so Deputy Chief Medical Examiner Cheryl Loewe testified with the assistance of Dr. Frasier's records from the autopsy. Referencing Dr. Frasier's records, Dr. Loewe testified regarding the manner in which Tarver died. Specifically, she explained that Tarver suffered multiple blows to the head that were consistent with blows inflicted by both the head and claw end of a hammer. Tarver had a fractured left eye socket; there were no signs of defensive injuries on his hands or arms. Dr. Loewe testified that there was no way to tell when Tarver was actually killed, but she estimated that he was probably killed a few days before March 4, 1987, based on the degree of rigor mortis and lack of decomposition.

Sergeant James A. Bivens from the Detroit Police Department (DPD) Homicide Section was part of the initial investigative team that responded to the murder scene at 11318 Piedmont. He arrived there at approximately 2:30 a.m. on March 4, 1987, and found Tarver sitting on the floor, slumped against the wall. Sergeant Bivens noticed blunt force injury near Tarver's left ear, a puncture wound on the right side of his neck and lacerations to his right ear. A rear basement

window showed evidence of forced entry. Someone removed the outer storm window and placed it on the ground. In the bathroom, a Band-Aid box was on the sink and the peeled strips of a Band-Aid (the part that is peeled off before applying the Band-Aid) were on the floor.

Officer Carl Kimber, an evidence technician, worked the crime scene at the Piedmont house. He collected items with suspected blood on them, took samples of blood from the walls and other immovable objects, and dusted for fingerprints.

The window in the basement bathroom was broken. There was glass on the floor in the basement bathroom, indicating that the window was broken from the outside. The southeast bedroom, right across the hall from Tarver's body, appeared ransacked. Items were on the floor and drawers were pulled out of the nightstand.

Paula Lytle, who worked as a senior forensic serologist in the DPD Crime Lab in 1987, tested the items that Office Kimber collected for blood and blood type. Lytle testified that she tested blood samples from defendant and Tarver and determined that they both had type O blood. Lytle testified that a piece of broken glass found beneath the broken basement window tested positive for blood. At one point, it appeared Lytle testified that she wrote "type B" somewhere on or near the item, but she testified that her test results were inconclusive with respect to the blood on the glass and she could not determine the blood type. In addition, a tissue found on the kitchen table and a blue checkbook found inside a dresser drawer in a bedroom both tested positive for type O blood.

In 2008, police tested some of the evidence recovered from the crime scene at the Piedmont house for DNA. Jennifer Summers, an expert in serology at the Michigan State Police Forensic Science Division in the Biology Unit, confirmed the presence of blood on the tissue found on the kitchen table. Summers also confirmed the presence of blood on the blue checkbook. She submitted a sample of both of these items to the Michigan State Police Northville Crime Laboratory for DNA testing. Summers also confirmed that the piece of shattered glass from the basement window contained human blood on it. There was a very faint stain in the corner. Summers did not send this sample for further testing because "it appeared to be such a faint stain in concentration," and there were other samples with stronger bloodstains.

Catherine Maggert, an expert in DNA profiling and forensic scientist with the crime laboratory in Northville, conducted DNA testing on the blood on the tissue and on the checkbook. Maggert explained that to develop a DNA profile, she assembles data from 13 different areas, or loci, of a DNA sample. A 14th marker indicates gender. When she tested the blood on the tissue, Maggert was able to obtain reportable data for 12 of the 13 loci. With respect to the checkbook blood, Maggert obtained reportable data for only three of the 13 loci, along with the gender area. The three loci with reportable data matched the corresponding loci in the DNA profile of the tissue blood. Maggert was also able to conclude that both DNA samples were from a male. Maggert explained that degradation or breakdown of DNA could cause the lack of reportable data from a locus.

Andrea Halvorson, another forensic scientist who performs DNA analysis at the Northville crime lab, compared the DNA profiles from the tissue blood and checkbook with a DNA profile developed from a buccal swab obtained from defendant. With respect to the tissue

blood, the 12 loci for which Maggert was able to collect data matched the corresponding loci in defendant's DNA. Halvorson testified that the probability of selecting an unrelated, random, African-American individual with 12 out of 13 loci matching the corresponding loci in the tissue blood DNA was one in four quadrillion. With respect to the checkbook blood, the three loci for which Maggert was able to collect data matched the corresponding loci in defendant's DNA. Halvorson explained that the probability of selecting an unrelated, random, African-American individual with the same DNA profile as the checkbook blood was one in 211.7 people.

On cross-examination, Halvorson testified that "the DNA from a sibling or . . . even a cousin, an uncle, something like that would be more similar. Those DNA types would be more likely to be found in a member of your family than they would in just a random person." She explained that, "any sort of comparisons to [a] related individual would be a completely different statistic," and she agreed that the only way to eliminate a brother is to run a comparison test of the brother's DNA. Halvorson agreed that she did not receive any blood samples from defendant's brother. However, she explained that only identical twins have ever been found to have the same DNA profile and she agreed that two siblings should have different DNA profiles even though they share the same parents.

In March 1987, the DPD's Latent Fingerprint Unit received nine photographs of print lifts, which Officer Kimber lifted during his investigation at the Piedmont house. Officer John Frelich compared the lifted prints with known prints from defendant, and Fred Moore, a senior technician, verified Officer Frelich's work. Marci McCleary, an expert in latent fingerprint examination and comparison and current employee of the Latent Fingerprint Unit, reexamined the prints in 2010. She testified that of the nine print lifts received, three were unusable because they did not have at least nine different characteristics. A fourth print was from a Band-Aid box, found on the sink in the bathroom on the first floor. McCleary concluded that this print matched defendant's left thumb; she matched 14 different identification points between defendant's known print and the Band-Aid box print. None of the other prints matched defendant and there were some prints that neither matched defendant nor Tarver.

Finally, the prosecution called Officer Charles Braxton to testify that police seized a waist-length, black and yellow size large jacket from defendant's house during a search after Tarver's murder. The jacket had two suspected bullet holes in the left shoulder area. However, on cross-examination, Officer Braxton clarified that he was probably just an observer during the execution of the search warrant and that he did not remember if he actually saw the jacket. Officer Braxton and Lytle testified that there was blood on the inside of the jacket near the left shoulder area. Lytle testified that the jacket tested positive for type O human blood.

During rebuttal argument, the prosecutor referenced that police seized the jacket from defendant's home and mentioned that it had type O blood inside. The prosecutor argued:

> Is it the deceased['s] blood or is it the defendant's blood? I really can't tell you that. It's possible it could be either one of those, all right.
>
> It's possible that it could very well be the defendant's blood after he was cut and everything, stuck his hand back in the jacket and got it there.

Following four days of trial testimony, the jury convicted defendant and the trial court sentenced him as set forth above. Thereafter, defendant filed a claim of appeal in this Court and subsequently moved for a new trial, an evidentiary hearing, and judgment notwithstanding the verdict. In his motion, defendant raised the same issues that he now raises on appeal including his argument that the prosecutor admitted false evidence when it introduced evidence of the jacket at trial. Defendant attached documentation to his motion to support his argument that police did not seize the jacket from his residence after the murder. Specifically, a DPD laboratory technician report indicated that the laboratory received the jacket on March 12, 1987, from Officer Kramer. Police executed a search warrant at defendant's home on March 11, 1987, at 9074 Westwood. However, the search warrant return indicated that police did not seize anything during the search. In addition, Officer Kramer wrote a memorandum on April 16, 1987, wherein he indicated that police did not seize anything during the search.

As noted above, at trial, the prosecution presented the testimony of Officer Braxton to establish that police seized the jacket with blood on the inside from defendant's home after Tarver's murder. Following defendant's motion for a new trial, the prosecution acknowledged that police did not seize the jacket during the search warrant related to this case. Police actually seized the jacket on September 11, 1986, in an unrelated incident before Tarver was murdered. However, the prosecution argued that the improper introduction of the evidence did not deny defendant a fair trial or affect the trial's outcome.

The trial court held an evidentiary hearing on June 2, 2011. Officer Braxton testified that he reviewed a laboratory analysis report for the jacket before testifying at trial. The report indicated that police seized the jacket from 9074 Westwood and that the laboratory received the jacket for analysis on March 12, 1987. Based on the information in the report, Officer Braxton assumed that police seized the jacket during the March 11, 1987 search of defendant's residence. Officer Braxton denied speaking with the trial prosecutor about deceiving the jury with his testimony. He explained that he did not discuss his testimony before trial with the prosecutor; the prosecutor just asked him to review the laboratory report.

The trial prosecutor also testified that he thought police seized the jacket during their execution of the search warrant on March 11, 1987 based on the date of the search warrant and the laboratory report. The test results for the jacket were included on the same report as the other evidence from the Tarver murder scene. He did not discover that his assumption was incorrect until he read appellate counsel's motion for a new trial. The prosecutor testified that he did not intend to make Officer Braxton testify to something that was not true, and if he had known the truth, he would not have introduced the jacket evidence. Furthermore, he did not reference the jacket in his opening statement or initial closing argument and only mentioned the jacket during rebuttal in response to defense counsel's closing argument. There was nothing in the case file to indicate why Officer Kramer brought the jacket to the lab on March 12, 1987.

As discussed in more detail below, the trial court also heard testimony concerning defendant's ineffective assistance of counsel claim. The trial court denied defendant's motion for a new trial and for judgment notwithstanding the verdict.

B. ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

Defendant contends that that there was insufficient evidence to support his conviction. We review a challenge to the sufficiency of the evidence de novo. *People v Parker*, 288 Mich App 500, 503; 795 NW2d 596 (2010). We construe the evidence in the light most favorable to the prosecution in determining if a rational trier of fact could find that all of the essential elements of the crime were proven beyond a reasonable doubt. *People v Jackson*, 292 Mich App 583, 587; 808 NW2d 541 (2011). In conducting our review, we must "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011) (internal quotations omitted). To demonstrate that the evidence presented at trial was sufficient to convict the defendant, the prosecution does not need to "negate every reasonable theory consistent with innocence." *Id.* Furthermore, we "will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012) (internal citations omitted). Circumstantial evidence and reasonable inferences from the evidence can provide enough proof to support the elements of an offense. *Kissner*, 292 Mich App at 534.

The elements of first-degree (felony) murder are:

> (1) the killing of a human being; (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result; (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316. . . . [*People v Seals*, 285 Mich App 1, 12; 776 NW2d 314 (2009) (quotation and citation omitted.]

The trial court instructed the jury on felony murder with breaking and entering a dwelling as the underlying felony. "Breaking and entering without permission requires (1) breaking and entering or (2) entering the building (3) without the owner's permission." *People v Cornell*, 466 Mich 335, 361; 646 NW2d 127 (2002).

In this case, the only issue in dispute was the identity of Tarver's murderer. Having reviewed the record, we conclude that the prosecutor presented sufficient evidence that would allow a reasonable juror to find defendant guilty of felony murder beyond a reasonable doubt. The evidence showed that someone entered Tarver's house by breaking a basement window. During this process, that individual cut himself, as there was blood on the shattered window glass. A tissue with blood on it was on the kitchen table. Expert testimony showed that defendant's DNA matched the DNA on the bloody tissue on 12 of 13 loci. Defendant's fingerprint was on a box of Band-Aids in the bathroom, and it appeared that a Band-Aid was recently used. The box was sitting on the bathroom sink and there were the peeled strips from the back of the Band-Aid on the bathroom floor. In addition, there was blood on a checkbook in the dresser drawer in the southeast bedroom of the home. Expert testimony showed that the defendant's DNA matched the DNA on the checkbook on 3 of 13 loci. While any of this evidence alone might not be sufficient to support defendant's conviction, taken as a whole and drawing all reasonable inferences in favor of the jury verdict, it was sufficient. See *Kissner*, 292 Mich App at 534. It was reasonable for the jury to infer that defendant left the bloody tissue on

the kitchen table after he cut himself breaking into Tarver's basement, used a Band-Aid to cover his wound, and left his blood on the checkbook while ransacking the southeast bedroom, either before or after killing Tarver.

Defendant argues that there was insufficient evidence because the prosecution must negate all reasonable theories of innocence. However, our Court has specifically rejected that proposition and instead held that evidence is sufficient "if the prosecution proves its theory beyond a reasonable doubt *in the face of whatever contradictory evidence the defendant may provide*." *Kissner*, 292 Mich App at 534 (emphasis added). Here, the prosecution proved defendant's guilt beyond a reasonable doubt given the evidence presented by defendant. See *id*.

II. GREAT WEIGHT OF THE EVIDENCE

Defendant also claims that his conviction was against the great weight of the evidence. Defendant moved in the trial court for a new trial based, in part, on these grounds. The trial court denied defendant's motion. We review for an abuse of discretion a trial court's decision to grant or deny a new trial on the basis that the verdict was against the great weight of the evidence. *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010). A court abuses its discretion, "when its decision falls outside the range of principled outcomes." *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010) (quotation and citation omitted).

A verdict is against the great weight of the evidence when "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009).

In this case, the trial court did not abuse its discretion in finding that defendant's conviction was not against the great weight of the evidence. Here, the evidence did not "preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id*. As discussed above, there was sufficient evidence to allow a rational trier of fact to infer that defendant broke into Tarver's home, murdered Tarver, and, in the process, left blood DNA and fingerprint evidence at the crime scene.

III. RIGHT TO PRESENT A DEFENSE

Defendant contends that the trial court denied him the right to present a defense and confront the witnesses when the court limited his ability to cross-examine witnesses. Defendant failed to preserve these issues for review because he did not object on the same basis in the lower court. *People v McPherson*, 263 Mich App 124, 137; 687 NW2d 370 (2004).

Whether defendant was denied the rights of confrontation and to present a defense involve questions of constitutional law that we review de novo. *People v Nunley*, 491 Mich 686, 697; 821 NW2d 642 (2012); *People v Unger*, 278 Mich App 210, 247; 749 NW2d 272 (2008). We review unpreserved claims of constitutional error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Under the plain error rule, a defendant must establish that a plain error occurred that affected his substantial rights in that it "affected the outcome of the lower court proceedings." *Id*.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Unger*, 278 Mich App at 249 (quotation and citation omitted). However, this right is not absolute, and states generally have the power "to establish and implement their own criminal trial rules and procedures." *Id*. at 250.

Defendant contends the trial court denied him the right to present a defense on four separate occasions. First, defendant argues that the trial court precluded his counsel from questioning Officer Kimber about possible contamination of a saline solution kit that he used at the crime scene. However, even assuming that the trial court improperly struck the question, defendant cannot show that any error affected the outcome of the proceedings. *Carines*, 460 Mich at 763. Here, defense counsel was able to ask most of the question about the potential contamination, which made his argument; he did not actually need Officer Kimber to answer. Defense counsel was also able to ask Officer Kimber other questions about his procedures at the crime scene and possible contamination.

Second, defendant argues that the court improperly prevented him from questioning Allen about Tarver's cleaning habits. Defendant contends that the prosecutor was allowed to solicit evidence that Tarver was a "neat freak," but he was prohibited from rebutting that assertion. Defendant does not explain why this evidence was relevant. Furthermore, the trial court merely required defendant to provide a foundation for his questioning. Once defendant established that Allen had been back to Tarver's house after moving out, defendant was free to question her about the condition of Tarver's house during those visits.

Third, defendant claims that the court prevented counsel from questioning Allen about defendant's visits to Tarver's house, which were relevant to explain why defendant's blood was on the tissue on the kitchen table. In this instance, the court precluded the questioning because defendant failed to establish that Allen had personal knowledge of how defendant's fingerprint got on the Band-Aid box or how a tissue with his blood got on the kitchen table in Tarver's house. Furthermore, defendant was able to solicit testimony from Allen about instances when defendant was at Tarver's house after she and Tarver stopped dating. Allen testified that defendant helped her move her things out of the house in December 1986 and went to Tarver's house to receive a stove hood the week he was murdered.

Fourth, defendant claims that the trial court precluded counsel from questioning Allen about Bobby's drug addiction and previous arrest for robbery charges. Here, even assuming that the court should have allowed the testimony as evidence of motive, defendant cannot show that any error affected the outcome of the proceedings. *Id*. In this case, the jury heard evidence that would have allowed it to conclude that Bobby committed the murder. Allen testified that someone broke into the victim's home sometime before the murder and that, thereafter, Bobby was not welcome at the victim's home. Moreover, given the significant evidence linking defendant to the crime scene, evidence of Bobby's drug conviction would not have affected the outcome of the proceedings. *Id*.

In sum, the trial court did not deny defendant the right to present a defense where none of the alleged instances of error affected his substantial rights. *Id*.

IV. RIGHT OF CONFRONTATION

Defendant asserts that the trial court denied him his right of confrontation when several witnesses testified regarding the actions and findings of other individuals who did not testify at trial. Defendant failed to preserve this issue for review because he did not object on the same basis in the trial court. *McPherson*, 263 Mich App at 137. We review unpreserved claims of constitutional error for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

An out-of-court testimonial statement is inadmissible under the Confrontation Clause "unless the declarant appears at trial or the defendant has had a previous opportunity to cross-examine the declarant." *Nunley*, 491 Mich at 698; see also US Const, Am VI. "A pretrial statement is testimonial if the declarant should reasonably have expected the statement to be used in a prosecutorial manner and if the statement was made under circumstances that would cause an objective witness reasonably to believe that the statement would be available for use at a later trial." *People v Dendel (On Second Remand)*, 289 Mich App 445, 453; 797 NW2d 645 (2010), citing *Crawford v Washington*, 541 US 36, 51-52; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant correctly contends that Dr. Loewe's testimony regarding the autopsy report violated the Confrontation Clause. An autopsy report is testimonial in nature. See *People v Lewis*, 490 Mich 921; 806 NW2d 295 (2011); *Bullcoming v New Mexico*, 564 US ___; 131 S Ct 2705; 180 L Ed 2d 610 (2011). Evidence regarding the content of the report was therefore inadmissible because the author of the report did not appear at trial and testify and defendant did not have a prior opportunity to cross-examine the author. *Nunley*, 491 Mich at 698. As such, Dr. Loewe's testimony was inadmissible and violated defendant's right of confrontation. However, defendant is not entitled to a new trial on this basis because the improper evidence did not affect the outcome of the proceedings. *Carines*, 460 Mich at 763. Here, the cause of Tarver's death was not at issue and defendant did not dispute that a crime occurred. Rather, the only disputed issue was the identity of Tarver's killer and the autopsy report did not shed light on the identity of the killer.

Next, defendant contends that McCleary's testimony regarding fingerprints lifted from the crime scene violated his right of confrontation. Here, McCleary testified that in 1987, Officers Frelich and Moore compared defendant's fingerprints with the prints that another officer lifted at the crime scene. However, McCleary did not testify regarding the results of that comparison. Rather, McCleary did her own comparison and testified with respect to her own conclusions. Accordingly, McCleary's testimony did not violate the Confrontation Clause as she appeared at trial where defendant had the opportunity to cross-examine her regarding her own findings. *Nunley*, 491 Mich at 698.

Defendant also contends that Officer Braxton's testimony regarding the jacket violated his right of confrontation. Specifically, at one point during direct examination, Officer Braxton agreed that the "file" reflected that police executed a search warrant at defendant's residence and that a jacket was seized during the execution of that warrant and was delivered to the police crime laboratory.

To the extent Officer Braxton relied on "the file" to testify that police executed a search warrant at defendant's residence, this was improper because Officer Braxton was relying on a testimonial statement by a declarant that did not appear at trial. However, this error was offset by the fact that Officer Braxton also testified that he participated in executing the search warrant. Thus, this aspect of Officer Braxton's testimony did not amount to plain error affecting defendant's substantial rights.

Similarly, Officer Braxton's reliance on "the file" to testify that police seized a jacket during the search was improper. However, this testimony did not amount to plain error affecting defendant's substantial rights. As discussed in more detail below, the jacket was not highly probative and there was other significant evidence that would have allowed the jury to find defendant guilty beyond a reasonable doubt. Furthermore, on cross-examination, defendant was free to question Officer Braxton regarding what he saw during the search and Officer Braxton acknowledged at one point that he did not recall seeing the jacket. In addition, defense counsel solicited testimony regarding the laboratory report when he asked Officer Braxton what the report said about bullet holes and the jacket's size.

V. EVIDENTIARY ERRORS

Defendant argues that the trial court improperly admitted blood-type evidence and his old prison booking photographs.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Smith*, 282 Mich App 191, 194; 772 NW2d 428 (2009). However, interpretation and application of the rules of evidence involve questions of law that we review de novo. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010).

Defendant incorrectly contends that blood-type evidence is inadmissible in a criminal prosecution. See *People v Punga*, 186 Mich App 671, 672-673; 465 NW2d 53 (1991) (holding that blood-type evidence is relevant and admissible). To the extent that defendant relies on *People v Sturdivant*, 91 Mich App 128; 283 NW2d 669 (1979), we note that *Sturdivant* is not binding precedent. See MCR 7.215(J)(1).

With respect to the prison booking photographs, before trial, the prosecutor stated that he intended to introduce the photographs from defendant's booking in July 1987 on a different matter. The court decided to allow two of the photographs to be admitted if they were cropped. Defense counsel stated that he "could live with that" resolution. "When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). Therefore, defendant has waived this issue. Nevertheless, even if we were to address the substance of defendant's argument, he would not be entitled to any relief. Here, the photographs were relevant to show that defendant was thin enough in 1987 to gain access to the victim's residence by climbing through the home's small shattered basement window. See MRE 401. Furthermore, the probative value of the evidence was not "substantially outweighed by the danger of unfair prejudice" under MRE 403. Here, the photographs were highly relevant in that they tended to show that defendant could have gained entry into the victim's home, which in turn, shed light on the identity of the perpetrator. In addition, there was no danger of unfair prejudice where the

trial court limited the number of photographs, ordered the prosecutor to crop the photographs, and instructed the jury that defendant was presumed innocent.

VI. PROSECUTORIAL MISCONDUCT

Next, defendant argues that the prosecutor engaged in misconduct on several separate occasions. "We review de novo claims of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial." *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). However, where, as in this case, a defendant fails to object to the alleged instances of misconduct, his claims are unpreserved and we review for plain error affecting defendant's substantial rights. *Id*.

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). "Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context." *Id*. at 382-383. There is no "error requiring reversal where a curative instruction could have alleviated any prejudicial effect," *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003), and jurors are presumed to follow their instructions. *Unger*, 278 Mich App at 235.

Defendant argues that the prosecution committed misconduct when he questioned Allen about her request for an attorney. Specifically, the questioning at issue occurred when the prosecutor asked Allen about a statement she gave to police on March 11, 1987. Allen volunteered that she refused to sign the statement "[b]ecause I didn't have a lawyer." To which the prosecutor replied, "if you don't have a lawyer you're not gonna [sic] sign any statement, right?"

Defendant does not cite any law in support of his argument that the prosecution cannot question *a witness* about her refusal to sign a statement to police without an attorney. Rather, defendant cites cases that discuss the rights of *an accused* to remain silent and to request an attorney. Moreover, defendant cannot show that this exchange served to deny him a fair and impartial trial. *Brown*, 294 Mich App at 382. Here, the prosecutor did not ask Allen about her request for counsel. Instead, the prosecutor merely asked if Allen remembered making the statement and refusing to sign it. Allen then volunteered that she refused to sign the statement because she did not have an attorney. The prosecutor responded by asking Allen about her own statement and he did not act improperly in doing so.

Defendant contends that the prosecution improperly subverted the presumption of innocence by arguing that "there's no such thing as a free murder" during his opening statement and closing argument.

It is well-settled that a defendant is presumed innocent and his guilt must be proved beyond a reasonable doubt. *People v Allen*, 466 Mich 86, 90; 643 NW2d 227 (2002). In his opening statement, the prosecutor stated that the "theme of this case" is that "[t]here's no such thing as a free murder . . . Because we're gonna [sic] be going back in time . . . to over 23 years ago." The prosecution reiterated the theme in his closing argument.

Contrary to defendant's assertions, the prosecution was merely remarking on the long passage of time since Tarver's murder and arguing that the jury should not acquit simply because the murder occurred 23 years ago. The prosecutor did not encourage the jury to convict defendant even if it did not find him guilty beyond a reasonable doubt. Finally, any error could have been cured by an objection and curative instruction. See *Callon*, 256 Mich App at 329-330. Indeed, the court instructed the jury that defendant is presumed innocent and must be found guilty beyond a reasonable doubt, and the jury is presumed to have followed its instructions. *Unger*, 278 Mich App at 235.

Next, defendant argues that the prosecutor committed misconduct when he introduced evidence of the jacket and introduced inaccurate testimony that the police seized the jacket after the murder.

A prosecutor may not knowingly use false testimony to obtain a conviction. *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). A prosecutor has a constitutional obligation to report to the defendant and the trial court whenever a government witness lies under oath, *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998), and a duty to correct false evidence, *People v Gratsch*, ___ Mich App ___; ___ NW2d ___ (Docket No. 305040, issued February 28, 2013), slip op, p 7.

At the post-trial evidentiary hearing, the trial prosecutor testified that he did not know that police seized the jacket in 1986, before Tarver's murder, until defendant filed his motion for a new trial. The trial court had the opportunity to observe the prosecutor testify at the evidentiary hearing and found his testimony credible. This Court "will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *Eisen*, 296 Mich App at 331. Thus, there is no evidence that the trial prosecutor knowingly presented false testimony. See *Aceval*, 282 Mich App at 389.

While improper, the admission of testimony regarding the jacket did not amount to plain error affecting defendant's substantial rights, *Cox*, 268 Mich App at 450-451, in that it did not affect the outcome of the proceedings. *Carines*, 460 Mich at 763. Here, the jacket was of low probative value. As defense counsel argued, the prosecution could not establish that it belonged to defendant. The jacket had two suspected bullet holes through it, but there was no evidence that Tarver's murder involved the use of a gun or that there was a struggle. Instead, other evidence directly linked defendant to Tarver's murder, including his fingerprint on the Band-Aid box, the bloody tissue, and the blood on the checkbook. This evidence standing alone was more than sufficient to allow a rational juror to convict defendant beyond a reasonable doubt.

VII. JURY INSTRUCTION

Defendant contends that the trial court abused its discretion in failing to give the jury the standard instruction on fingerprint evidence.

We review claims of instructional error de novo. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). However, we review for an abuse of discretion the trial court's determination whether an instruction is applicable to the facts of a case. *Id.* A court abuses its discretion, "when its decision falls outside the range of principled outcomes." *Feezel*, 486 Mich

at 192. When a defendant's requested instruction was supported by the evidence but not given, he has the burden of showing that "the trial court's failure to give the requested instruction resulted in a miscarriage of justice." *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003) (quotation and citation omitted).

"A defendant's request for a jury instruction on a theory or defense must be granted if supported by the evidence." *Id*. Defendant requested CJI2d 4.15, which provides:

> Before a defendant may be convicted on the basis of fingerprint evidence, the people must prove that the prints correspond to those of the accused and were found in the place where the crime was committed under such circumstance that they could only have been impressed at the time when the crime was committed.

The use note for this instruction states that it should only be given when fingerprint evidence is the only evidence of identity. See Use Note, CJI2d 4.15.

An abuse of discretion does not occur when the trial court's decision "'is within the range of options from which one would expect a reasonable trial judge to select.'" *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003), quoting *United States v Penny*, 60 F3d 1257, 1265 (CA 7, 1995). The trial court's decision to follow the use note's directive was reasonable, and therefore, not an abuse of discretion. Even if the court erred, this error was harmless because the DNA evidence was sufficient for a jury to conclude beyond a reasonable doubt that defendant killed Tarver.

VIII. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant contends that counsel rendered ineffective assistance of counsel on several different occasions during the trial.

"Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). We review the trial court's findings of fact for clear error and questions of constitutional law de novo. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake. *Armstrong*, 490 Mich at 289.

In order to demonstrate that he was denied the effective assistance of counsel under either the federal or state constitutions, a defendant must first show that trial counsel's performance was "deficient," and second, a defendant must show that the "deficient performance prejudiced the defense." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Whether defense counsel's performance was deficient is measured against an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin*, 463 Mich at 600. A defendant bears a heavy burden of overcoming the presumption that counsel rendered effective assistance. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant contends that trial counsel was ineffective for failing to file a motion to quash before trial and for failing to move for a directed verdict after the close of proofs. Generally, counsel has discretion over his method of trial strategy, and we will not substitute our own judgment or evaluate counsel's performance with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

In this case, counsel made a strategic decision not to move to quash or for a directed verdict. This decision did not fall below an objective standard of reasonableness. *Toma*, 462 Mich at 302. As discussed above, there was sufficient evidence to allow a jury to conclude that defendant killed the victim including DNA and fingerprint evidence such that motions to quash or for a directed verdict would have been futile. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel").

Next, defendant contends that counsel was ineffective for advising him not to testify in his own defense at trial.

At the post-conviction evidentiary hearing, counsel testified regarding why he advised defendant not to testify. Counsel first stated that he did not have defendant testify because of information defendant told him in privileged conversations. He was not going to "suborn any perjury." Second, trial counsel said that he was concerned about defendant's 1987 conviction for assault with intent to do great bodily harm less than murder. Even though the conviction was more than 10 years old and did not deal with truth or dishonesty, counsel was worried that defendant would "open certain doors on direct examination." For example, defendant might actually say something about being a nonviolent person. In addition, counsel said it would have been "a monumental blunder" to have defendant testify because defendant would not have been able to explain how his blood was in Tarver's house.

The trial court concluded that counsel did not render ineffective assistance in advising defendant not to testify. The court reasoned that counsel's concern about defendant's prior conviction might have been "overly cautious" but was not unsound. In addition, the court reasoned that counsel's advice was much more nuanced than defendant claimed it was and generally concerned the risks of defendant testifying.

"Counsel's decision whether to call a witness is presumed to be a strategic one for which this Court will not substitute its judgment." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). The trial court found trial counsel credible with respect to the reasoning behind his advice. This finding was not clearly erroneous. *Jordan*, 275 Mich App at 667. Trial counsel's testimony at the evidentiary hearing showed that he had valid concerns regarding defendant's testimony. He did not want to "open the door" with respect to defendant's prior conviction and he had concerns about perjury and defendant's inability to explain the presence of his blood at the crime scene. Given counsel's legitimate concerns about defendant taking the stand, counsel made a strategic decision to advise defendant against testifying and the trial court did not clearly err in finding that counsel acted reasonably in making that decision.

Next, defendant contends that counsel rendered ineffective assistance of counsel when he failed to object to the testimonies of McCleary, Officer Braxton, and Dr. Loewe on Confrontation Clause grounds.

In this case, as discussed above, McCleary's testimony did not violate the Confrontation Clause. Therefore, counsel did not act deficiently in failing to object to her testimony on this basis because any objection would have been futile. *Ericksen*, 288 Mich App at 201.

Counsel should have objected to Dr. Loewe's testimony. As discussed above, Dr. Loewe's testimony was inadmissible under the Confrontation Clause and counsel's lack of familiarity with recent United States Supreme Court precedent on the issue amounted to deficient performance. However, as discussed above, Dr. Loewe's testimony regarding the contents of the autopsy report concerned the manner in which the victim died. Cause of death was not at issue in this case. Instead, the critical issue concerned the identity of the killer and Dr. Loewe's testimony did not shed light on the identity of the killer. Accordingly, defendant cannot show there is a reasonable probability that but for counsel's failure to object to Dr. Loewe's testimony the result of the proceeding would have been different. *Carbin*, 463 Mich at 600.

Similarly, while a portion of Officer Braxton's testimony regarding the jacket was inadmissible under the Confrontation Clause, counsel's failure to object did not impact the outcome of the trial. *Id.* Here, evidence of the jacket was of low probative value where there was other evidence that defendant's blood was at the crime scene and where there was no evidence that the murder involved a gun.

Next, defendant contends that counsel rendered ineffective assistance of counsel in failing to object to the prosecution's introduction of testimony about the jacket.

At the post-conviction evidentiary hearing, defendant testified that he told counsel that police seized the jacket during a search in 1986 in connection with a different case. Defendant testified that counsel knew police seized the jacket before Tarver's murder because counsel represented defendant in the 1986 case. Counsel testified and admitted that he did not object to admission of testimony about the jacket. Counsel indicated that he saw Officer Kramer's memorandum, which indicated that police did not seize anything from defendant's home during the post-murder search of the residence. Counsel stated that the prosecutor informed him that police seized the jacket from defendant's residence during that search.

The trial court found that trial counsel did not render ineffective assistance in failing to object to evidence of the jacket. The court concluded that it was reasonable for counsel to assume, as the prosecutor did, that police seized the jacket during the search on March 11, 1987 because it was delivered to the laboratory the day after the search. Further, the court concluded that admission of evidence of the jacket was not outcome-determinative where the other evidence against defendant, specifically the DNA and fingerprint evidence, was overwhelming.

In this case, while counsel's performance in investigating the seizure of the jacket may have fallen below an objective standard of reasonableness, the trial court did not clearly err in finding that admission of evidence regarding the jacket did not affect the outcome of the proceeding. *Jordan*, 275 Mich App at 667. As discussed above, the jacket evidence did not

affect the outcome of the proceedings. The evidence was of low probative value and there was significant other evidence that would have allowed the jury to conclude that defendant killed Tarver including DNA and fingerprint evidence. On this record, defendant cannot show that there is a reasonable probability that but for counsel's failure to object to the jacket evidence, the result of the proceeding would have been different. *Carbin*, 463 Mich at 600.

Next, defendant contends that counsel rendered ineffective assistance in failing to call a DNA expert to testify and in failing to call other witnesses at trial.

"An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." *Payne*, 285 Mich App at 190. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Rockey*, 237 Mich App at 77.

At the post-conviction evidentiary hearing, counsel testified that he retained an independent expert, but learned that the firm's findings were not beneficial to his client. Counsel testified that he discussed strategies with the independent firm for addressing the DNA evidence at trial. At trial, counsel advanced the theory that defendant's brother Bobby could have been the perpetrator. Counsel explained that he did not want to have Bobby's DNA tested because the test could have eliminated Bobby as a potential perpetrator, which would have ruined defendant's defense.

The trial court concluded that counsel did not act deficiently in failing to retain an independent DNA expert. The court found that counsel did retain an expert who advised counsel that the DNA evidence was not favorable to defendant.

In this case, the trial court did not clearly err in finding that counsel rendered effective assistance with respect to his handling of the DNA evidence. Counsel retained an independent DNA expert. When the independent expert's results were not favorable to his client, counsel decided not to obtain a written report or call any expert to testify at trial. This was reasonable strategy given the circumstances. Further, counsel made a reasonable strategic decision not to have Bobby's DNA tested given the results could have destroyed defendant's only defense. It is reasonable trial strategy not to seek further testing when the results could implicate the defendant. See *People v Rao*, 491 Mich 271, 290-291; 815 NW2d 105 (2012). In sum, given all of the facts and circumstances of the case, counsel acted reasonably with respect to his handling of the DNA evidence and in deciding not to call an independent expert witness.

Defendant contends that counsel should have called his mother and sister to testify at trial. Counsel testified that he did not call defendant's mother as a witness because he was able to get all of the information he needed from Allen. The trial court concluded that counsel did not act deficiently in failing to call other witnesses because defendant failed to demonstrate what important testimony other witnesses would have provided.

Defendant claims that his mother and sister would have testified about instances when defendant was at Tarver's house after Tarver and Allen broke up. However, Allen testified about Tarver and defendant's friendship and occasions when defendant visited Tarver's house after Tarver and Allen stopped living together. Presumably, Allen had the most knowledge of Tarver

and defendant's relationship since she dated and lived with Tarver. Therefore, it was reasonable for counsel to decide to call Allen as a witness instead of defendant's mother or sister. To the extent defendant contends that his sister could have offered testimony about seizure of the jacket, as discussed above, admission of the jacket evidence did not affect the outcome of the proceedings. Therefore, defendant cannot show that there is a reasonable probably that but for counsel's failure to call his sister to testify at trial, the result of the proceeding would have been different. *Carbin*, 463 Mich at 600. In sum, the trial court did not clearly err in concluding that counsel did not render ineffective assistance in failing to call other witnesses at trial. *Jordan*, 275 Mich App at 667.

Finally, defendant contends that counsel should have made several other objections at trial. Defendant's arguments lack merit. First, an objection to the admission of the blood-type evidence would have been meritless. As discussed above, this evidence was admissible. Second, an objection to the prosecution's alleged questions to Allen about her request for an attorney would have been meritless. As discussed above, the prosecution did not solicit this information. Allen volunteered the information that she did not want to sign the statement without an attorney. Finally, as discussed above, the prosecution's argument that there is "no such thing as a free murder" did not subvert the presumption of innocence and the trial court instructed the jury that defendant was presumed innocent. In sum, defendant cannot show that counsel acted deficiently in failing to raise any of the above-referenced objections where counsel need not raise a futile objection. *Ericksen*, 288 Mich App at 201.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray